HIGH COURT OF NAMIBIA: MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A 316/2015

In the matter between:

MARIE MARYNA LUDIK **APPLICANT**

And

FRIKKIE DAWID KEEVE **FIRST RESPONDENT**

DAPHNE SWANEPOEL PROPERTIES CC **SECOND RESPONDENT**

Neutral citation: *Ludik v Keeve & Another* (A 316/2015) [2016] NAHCMD 4 (20 January 2016)

Coram: UEITELE,J

Heard on: 13 & 18 November 2015

Delivered on: 20 January 2016

Flynote: ***Practice*** – *Notice of Motion* - Amendment of - Substitution of the name of the right respondent for that of the wrong one - Application for amendment always in

order unless made *mala fide* or prejudicial to other party - Courts gradually moving away from overly formal approach - Mere fact that citation or description of party happening to be of non-existent entity not per se rendering notice of motion void - Citation of second respondent nothing more than misdescription - Application for amendment allowed.

Practice - *Parties* - Misjoinder or non-joinder- Test of a direct and substantial interest in subject-matter of litigation the decisive criterion.

Spoliation - *Mandament van spolie* - Possessor need not be physically present to be in possession - Respondents changing locks on premises leased by appellants - Respondents not at liberty to take law into own hands.

Summary: The respondents had leased Erf [4…….], [7…..] [R……] Avenue, [K…….], [S……..], Namibia, to the applicant. At the termination of the applicant did not hand over the keys of the property to the respondents. On 4 November 2015 the respondents went to the property replaced the keys to the property and changed the frequencies of the remote controls to the property. Applicant applied for a spoliation order against the respondents. Respondents opposed the application and also raised two points in limine,

Held, that since the second respondent as described in the amended notice of motion is clearly recognizable from the original notice of motion, the amendment sought by the applicant amounts to no more than the 'clarification of a defective pleading' and not the introduction of a new legal entity as the second respondent the applicant's application for the amendment must thus succeed.

Held, further the right of a defendant to demand the joinder of another party and the duty of the court to order such joinder or to ensure that there is waiver of the right to be

joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make. These circumstances were absent in this matter.

Held, furthermore that that the remedy of *mandament van spolie* is aimed at every unlawful and involuntary loss of possession by any possessor, and its object is no more than the restoration of the status *quo ante* as a preliminary to any inquiry or investigation into the merits of the respective claims of the parties to the thing in question.

Held, furthermore that the applicant was in peaceful and undisturbed possession of the property on 4 November 2015 when the respondents resorted to self-help and changed the locks and alarm frequencies to the property accordingly, the respondents performed an act of spoliation.

ORDER

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1. The non-compliance with the rules of this court and hearing the application on an urgent basis as is envisaged in rule 73(3) of the High Court Rules is condoned.

2. The application for the amendment of the notice of motion for the substitution of *Daphne Swanepoel Properties CC"* with *"Daphne Swanepoel trading as Daphne Swanepoel Properties"* as the second respondent is granted.

3. The first and second respondents are ordered to forthwith restore the applicant's peaceful and undisturbed possession *ante omnia* in and to the property

described as: [Erf 4……], [7…..] [R……..] Avenue, [K…….], [S…….], Namibia, to the applicant.

4. The first and second respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay applicant's costs, such costs are to include the costs of one instructing and one instructed counsel.

JUDGMENT

UEITELE, J

Introduction

[1] On 9 November 2015, Ms Marie Maryna Ludik (to whom I will, in this judgment, refer to as the applicant), caused a notice of motion to be issued out of this court notifying Frikkie Dawid Keeve as first respondent Daphne Swanepoel Properties CC as second respondent (I will, in this judgment, refer to them as the respondents, except where the context requires that I refer to each as first or second respondent) that she will on 13 November 2015 and on an urgent basis apply to this court for the following relief:

1. ‘1. That the applicant’s non-compliance with the forms and service provided for by the rules of court is condoned and the matter is heard as one of urgency as contemplated by Rule 73(3) of the Rules.

2.

3. 2. 2.1 That the first and second respondents immediately and forthwith restore *ante omnia* possession of the property described as: [Erf 4…….], [7……..] R…….] Avenue, [K……..], [S…….], Namibia, to the applicant.

4.

2.2 That the first and second respondents pay the applicant's costs, jointly and severally, including the costs of one instructing and one instructed counsel.'

5.

6. **ALTERNATIVELY**

7. 3 3.1 That a *rule nisi* do issue calling upon the first and second to show cause if any, on a date determined by this court why an order that the first and second respondents immediately and forthwith restore *ante omnia* possession of the property described as: [Erf 4…….], [7……] [R……] Avenue, [K……..], [S…….], Namibia, to the applicant should not be made final.

8.

9. 3.2 That the first and second respondents pay the applicant's costs, jointly and severally, including the costs of one instructing and one instructed counsel.

10.

11. 3.3 That the order in paragraph 3.1 hereof shall operate with immediate effect pending the return date of the *rule nisi.*

12.

13. [2] On 11 November 2015 both the first and second respondents gave notice of their intention to oppose the applicant's application and on 12 November 2015 the first respondent filed the answering affidavit on his own behalf and on behalf of a certain Daphne Swanepoel.

14.

[3] In the answering affidavit the respondents raised two points *in limine* the first being that the applicant incorrectly cited the second respondent resulting in the misjoinder of Daphne Swanepoel Properties CC and the non-joinder of Daphne Swanepoel t/a Daphne Swanepoel Properties. The first respondent states in the answering affidavit that there is no entity or *persona* such as Daphne Swanepoel Properties CC. He further states that in as far as there is an attempt to make a

reference and/or to cite Daphne Swanepoel, the correct citation would have been Daphne Swanepoel t/a Daphne Swanepoel Properties.

[4] The first respondent continued in his opposing affidavit to state that Daphne Swanepoel is a sole proprietor and has been issued a Fidelity Fund Certificate by the Namibian Estate Agents Board (No R2015/4659) in terms of which it is clearly evident that her status is one of a sole proprietor and the name of her firm/company is Daphne Swanepoel Properties. He further states that in the notice of motion, the applicant in essence seeks her relief jointly against both him and Mrs Swanepoel and that it is therefore imperative that Daphne Swanepoel be joined to these proceedings as a party. The first respondent furthermore alleges that he is married to his wife, Martha Keeve, in community of property and that she is therefore a joint co-owner of the property and she has also not been joined to this application.

[5] The second point *in limine* raised by the respondents is the alleged failure by the applicant to disclose a cause of action. The first respondent alleges that the applicant is attempting to enforce and/or preserve its lien over property by virtue of one or other impending cause of action founded in either a debtor/creditor relationship or enrichment. He states that in as far as the applicant relies on some or other debtor/creditor relationship between her and them (i.e. first and second respondents), she would need to at least allege the basis upon which the relationship exists. In its most simple form she would at least have to set out and properly allege the underlying contract which would need to have existed before there could be a debtor/creditor relationship. She fails to do this, so the argument went. He furthermore alleges that in as far as she bases her cause for enforcing her lien on enrichment, the applicant would need to make the essential allegations to demonstrate that there was at least *prima facie* an instance of unjust enrichment where she was impoverished and the respondents enriched.
15.

16. [6] On 13 November 2015 when the matter was called the applicant had not filed her replying affidavit, I accordingly postponed the matter to 18 November 2015 to enable the applicant to file her replying affidavit and for the parties to submit written heads of arguments. In her replying affidavit the applicant indicated that the question of the citation of the second respondent is a legal matter and that her legal representative will in argument ask leave to rectify the citation of the second respondent. During oral submission Mr Jacobs who appeared on behalf of the applicant made submission and sought an order amending the citation of the second respondent to refer to her as Daphne Swanepoel t/a Daphne Swanepoel Properties. Before I deal with the points *in limine* raised by the respondents and the merits of the application if necessary, I deem it appropriate to, first briefly set out the background of the application.

17.

18. Background

19.

1.1. [7] On the 15th of July 2014, the first respondent and Ms Daphne Swanepoel who trades as Daphne Swanepoel Properties the estate agent acting on behalf of Frikkie Dawid Keeve on the one hand and the applicant on the other hand signed a contract of lease in respect of [Erf 4……], No. [7……] [R……] Avenue, [K…….], [S…….], Namibia. (I will, in this judgment, refer to this Erf as the property) in terms of which the applicant leased from the first respondent and the first respondent rented the property to the applicant for a period of twelve months. The lease agreement would terminate on 31 July 2015.

1.2.

[8] After the parties signed the lease agreement the applicant moved into the property and took occupation of the property. The applicant alleges that when she moved into the property it was a newly built property and all the fixtures and fittings were not installed. As such, she spent more than N$ 125 899 on improvements to the property during the time she was in possession.

[9] Despite the fact that the lease agreement terminated on 31 July 2015 as stipulated in clause 15 of that agreement, the first respondent and the applicant orally agreed to extend the term of the lease and she remained in possession of the property after 31 July 2015. During the period of extension of the lease agreement (that i.e. between 1 August 2015 and 15 October 2015) the parties discussed the possibility of the applicant purchasing the property. The negotiations to purchase the property stalled primarily because the parties could not agree as to who was to pay the estate agent's commission.

[10] On the 15th of October 2015, the applicant sent a text message to the first respondent enquiring about the progress in respect of the sale and purchase of the property. The first respondent replied to the text message stating that another purchaser had signed a deed of sale for the property and that they would have to *"see what happens"*. The applicant responded to this text message stating that she could not wait in uncertainty as she had family visiting from South Africa in December 2015. After that response the first respondent gave the applicant notice to vacate the property by 30 November 2015.

[11] On 28 October 2015 the applicant send an electronic message to the first respondent. In the electronic message the applicant amongst other things states that she is busy packing and expects to be out of the property by the following week. In the mail she furthermore states that she wants to know who she must give the keys of the property to and who will come and do the inspection of the property. She thereafter removed all her belongings from the property locked the doors and activated the alarm and kept the keys and all the garage remote controls. She states that she was under the impression that the first respondent would reimburse her for the improvements which she had effected to the property. She was thus waiting for the first respondent to reimburse her before she would hand over the keys and the remote controls to the second respondent.

[12] The applicant contacted the first respondent and enquired from him as to when he was going to reimburse her. At that time the first respondent was in Tanzania and he advised the applicant to take up the matter with the second respondent. I pause here to observe that the version of the parties slightly differ as to what was said between the applicant and the second respondent during this contact. But what is not in dispute is that the applicant did not hand over the keys and the remote controls to the second respondent.

[13] On the 3rd of November 2015, and after seeking legal advice the applicant addressed an electronic mail to the respondents in which she informed them that she had sought legal advice on the aspect of her claim for reimbursement and that *"the attorney's advice is that I do not hand over the keys until I have a written letter from you to pay the outstanding amounts"* and *"the sooner you give me an answer the sooner we can do the handover of the keys and then this whole story will be finalised"*.

[14] During the morning of the 4th of November 2015, the second respondent contacted the applicant and requested her to provide her with the receipts for the improvements. Applicant alleges that she delivered (but first respondent denies this allegation) the receipts to the second respondent's at her office. Later during the afternoon, the applicant received a telephone call from the security company, Rubicon Security, who informed her that the alarm had been set off at the property and that it was their technicians that had set off the alarm.

[15] After the conversation with the security company the applicant and a certain Ms Ronel Ludik went to the property. Upon their arrival at the property they found a man dressed in Rubicon Security clothing atop a ladder busy working on the alarm system. She asked what he was doing there and the man who identified himself as Daphne Swanepoel's husband informed her that the *"owner"* had instructed them to change all

the locks to the doors and to change the alarm codes' frequencies. She asked him why they were doing this and he replied that the applicant's contract had been cancelled and that she was therefore not allowed access to the property anymore. They also changed the installed frequency of the automated garage doors and as a result her remote control could no longer operate the automated garage doors. It is these events which resulted in her launching this application on the 9th of November 2015. I will now proceed to consider the points *in limine* raised by the respondents.

The points *in limine*

Incorrect citation of second respondent.

[16] As I have indicated in the introductory part of this judgment the respondents take issue with the fact that the second respondent is cited as Daphne Swanepoel Properties CC. They state that no entity or *persona* such as Daphne Swanepoel Properties CC exists. They further content that the effect of citing a non-existing entity is that the party who has in interest in this matter namely Ms Daphne Swanepoel t/a Daphne Swanepoel Properties was not joined.

[17] The applicant's legal practitioner of record Ms Ankia Delport of Delport Nederlof Attorneys filed a supporting affidavit to the applicant's replying affidavit in which she explains that the incorrect citation of the second respondent was occasioned by how the second respondent described herself on her website. Ms Delport states that the information of the citation of the second respondent was obtained from her website at *http://www.dsprop.com/about-us*, (Ms. Delport attached it as Annexure "AD 3" to her affidavit) where at the bottom of the page it states:

> *'Daphne Swanepoel (CEO/Proprietor)*
> *DAPHNE SWANEPOEL PROPERTIES CC.'*

Ms. Delport continues and states that the incorrect citation of the second respondent was occasioned by her own webpage and the applicant cannot be blamed therefore. She further gave notice in the replying affidavit that her instructed counsel will at the hearing of the application apply for the substitution of *Daphne Swanepoel Properties CC"* with *"Daphne Swanepoel trading as Daphne Swanepoel Properties"* as the second respondent.

[18] At the hearing of this application Mr Jacobs who appeared for the applicant argued that where a party is incorrectly described, the incorrect description can on application be corrected by the court provided that there is no prejudice to the party. In support of this submission Mr Jacobs referred me to the case of *Barnard and Others NNO v Imperial Bank Ltd and Another.* [1] He accordingly moved an application from the bar for leave to amend the notice of motion in order to correctly "cite" the second respondent.

[19] Mr Jones who appeared for the respondents objected to the granting of the amendment sought. The basis of Mr Jones' objection is firstly that there is no substantive application by the applicant and secondly that Daphne Swanepoel CC is non-existent *persona* and the citation of that non-existent entity is not simply a misnomer. He referred me to the matter of *L & G Cantamessa v Reef Plumbers*[2] in which an action based on contract had been instituted in a magistrate's court against two partners described in the summons as L. and G. Cantamessa, who it appeared were also the directors and sole shareholders in a private company known as L. and G. Cantamessa (Pty.) Ltd. During the trial of the action it became clear that the contract was made with the company and not with the firm, and application was made by the plaintiff to substitute the name of the company as defendant. The magistrate held that the name of the defendants in which they were sued, i.e. the name of the partnership, was a mere misnomer, and he allowed the amendment.

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1 2012 (5) SA 542 (GSJ).

2 1935 TPD 56.

[20] The defendant applied for review of the proceedings on the ground of irregularity and the review court set them aside on the ground that the company was an entirely different *persona* in law from the partnership, that the effect of the amendment was to introduce a new defendant into the case, that this was not merely a matter of misnomer, and that there had been a gross irregularity in that a defendant who had not been cited and was not before the court had been introduced into the action as the defendant at the conclusion of the case.

[21] As regard the protest by Mr. Jones that there is no substantive application I simply note that this application was brought on an urgent basis and that the applicant sought an order condoning her non-compliance with the forms and service provided for by the rules of court. Mr. Jones did not dispute the urgency of this matter nor did he argue that the applicant failed to make out a case for urgency. I am satisfied that this matter is urgent and I condone the applicant's noncompliance with the rules of court in respect of form and service. I therefore find that in the circumstances of this matter the notice in the replying affidavit that the applicant will apply for an amendment of the citation of the second respondent suffices for me to consider it even in the absence of substantive application.

[22] It is trite law that the court hearing an application for an amendment has a wide discretion whether or not to grant it, a discretion which must clearly be exercised judicially.[3] The general approach of this court, which has been confirmed in numerous cases, is that an amendment of a pleading should always be allowed unless the application to amend is *mala fide* or unless the amendment would cause such injustice

[3]Erasmus, Breitenbach, Van Loggerenberg and Fichardt *Superior Court Practice* (1994, with loose-leaf updates) at B1 – 178; Herbstein and Van Winsen *Civil Practice of the Supreme Court of South Africa* 4th ed (1997) by Van Winsen, Cilliers and Loots (edited by Dendy) at 515 and the other authorities there cited**.**

or prejudice to the other side as cannot be compensated by an order for costs and, where appropriate, a postponement. [4]

[23] The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done[5]. The power of the court to allow even material amendments is limited only by considerations of prejudice or injustice to the other side.[6] Despite this liberal attitude of the court towards amendments to pleadings, it must not be forgotten that a litigant seeking to make an amendment does not do so as a matter of right, but is seeking an indulgence and must offer some explanation as to why the amendment is required.[7]

[24] Ms Delport has offered an explanation as to how and why the second respondent is wrongly cited. Mr. Jones argued that, the applicant knew or certainly ought to have known of the correct description of the second respondent. It is true as Mr. Jones argued, that, from the website page attached as Annexure "AD 3" to Ms. Delport's affidavit the following is clear. The page link is titled "About Daphne Swanepoel Properties" (no reference to CC). The heading (opener) on the page (in bold large print) reads "About Daphne Swanepoel Properties" (no reference to CC). Under the heading "Sphere of Business" the following appears-

> 'As an established real estate agency, Daphne Swanepoel Properties (no reference to CC) offer customers …'

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[4] See *Meyer v Deputy Sheriff, Windhoek and Others*1999 NR 146 (HC).

[5] See *Cross v Ferreira* 1950 (3) SA 443 (C) at 447.

[6]See *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 637A - 641C and *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 369F - I).

[7] *Krogman v Van Reenen* 1926 OPD 191 at 194 – 5.

The second page link (2 of 2) is titled “About Daphne Swanepoel Properties” (no reference to CC). At the end of the write up an electronic signature appears as-Daphne’ Swanepoel (CEO/Proprietor). It is also correct, as Mr Jones submitted that a “CEO” and “Proprietor” are not usual references to office bearers in a close corporation, who are known as managing members and members.

[25] Even if I assume in favour of the respondents that the applicant knew or ought to have known of the correct description of the defendant from website description, it is clear from the papers before the court that the firm of attorneys who ultimately issued the notice of motion, acting on the instructions of the applicant, did not know the correct description of the second respondent. From the affidavit filed by Ms. Delport in support of the application for amendment, it is evident that the said Ms. Delport relied on the website page of the second respondent as to the precise 'legal status' of the Daphne Swanepoel Properties. Nevertheless, I am therefore satisfied that the mistake made in the description of the defendant was a *bona fide* one and that I am not precluded from granting the amendment simply because of what one might call the ineptitude or the carelessness of the applicant or her legal representatives or both the applicant and her legal representative.

[26] I would, however, be precluded from granting the amendment if the effect of allowing the amendment would be prejudicial to the second respondent. In this matter Mr. Jones did not point out any prejudice which the respondents will suffer if I were to allow the amendment. Moreover the facts of this matter indicate that in the original notice of motion, and the founding affidavit the second respondent was cited as having her place of business at Stadtmitte Shop 3, Swakopmund. The notice of motion, the certificate of urgency, the founding affidavit and the confirmatory affidavit were served on a certain Ms. Rosseau a 'Company Secretary at Daphne Swanepoel Properties CC' at this address. A notice of intention to defend was entered on behalf of Ms. Daphne Swanepoel Properties. The first respondent in his answering affidavit in fact confirmed

that Ms. Daphne Swanepoel t/a Daphne Swanepoel Properties conducted her business from Stadtmitte Shop 3, Swakopmund and that she ultimately received the notice of motion and the founding affidavit. Mr. Jones did also not deny that the notice of motion was intended for Ms. Daphne Swanepoel.

[27] In the matter of *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron*[8] where a defendant had incorrectly been sued as lessee instead of as a surety for the debts of the lessee, Trollip JA emphasized that what must be considered is the substance of the process and not merely its form. In the matter of *Four Tower Investments (Pty) Ltd v André's Motors*[9]) Galgut DJP remarked that since *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron*, decisions in the reported cases tend to show that there has been a gradual move away from an overly formal approach. This development is to be welcomed because it facilitates the proper ventilation of the issues and the attainment of justice in a case thereby giving effect to the spirit of this court's rules[10]. In line with this approach courts should therefore be careful look at the substance of the matter and must not to find prejudice where none really exists.

[28] Galgut DJP[11] cautioned that the facts of each case are never the same. He stated that in some instances the incorrect citation happens to be one of an otherwise nonexistent *persona*, and because of the well-established rule that a pleading that is a nullity cannot be amended, the question that has sometimes been posed in such cases is whether the pleading concerned is as a result a nullity. The learned Judge continued and said whether a process is a nullity or not will depend on the facts of the case, and

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8 1978 (1) SA 463 (A) at 470F - 471C.

9 2005 (3) SA 39 (N).

10 Rule 1(3) of this Court's Rules amongst other things provide that: 'The overriding objective of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable …'.

11 *Supra* footnote 9 at 45.

on the authorities it seems that it may be a question of the degree to which the given process is deficient. He said:

> 'As I see it, however, the fact on its own that the citation or description of a party happens to be of a nonexistent entity should not render the summons a nullity.'

[29] In the matter of *Mutsi v Santam Versekeringsmaatskappy en 'n Ander*[12], where the defendant was incorrectly cited as Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Beperk. The court held that because the service of the summons was effected on the correct defendant it was a mere misdescription of the defendant concerned and that an amendment would not amount to a substitution of one party for another. Similarly in the matter of *Embling and Another v Two Oceans Aquarium CC*[13] a similar approach was adopted. In that matter the plaintiffs had cited the defendant as Two Oceans Aquarium CC suing it as the alleged owner of an aquarium in which the first plaintiff had fallen and injured herself, she and the second plaintiff claimed damages. It turned out, however, that the owner concerned was in fact the Two Oceans Aquarium Trust. The facts showed that the summons had been served at the property on a representative of the trust, and that it was the trust that in fact defended the action. Despite the fact that the plaintiffs' claims would otherwise be held to have become prescribed, Van Heerden J granted the application for amendment. In doing so she rejected the contention that, because the party as cited had been nonexistent, the summons was a nullity. The learned judge said:

> 'In my view, the existence of a cause of action is as much 'a basic component of an action' as the existence in law and in fact of a defendant. This being so, an application of the test formulated by Eksteen JA in the *Sentrachem* case leads me to the conclusion that, provided the defendant as described in the amended summons is clearly recognisable from the original summons, the amendment sought by the plaintiffs

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12 1963 (3) SA 11 (O).

13 2000 (3) SA 691 (C).

amounts to no more than the 'clarification of a defective pleading' and not the introduction of a new legal entity as the defendant.'

[30] As I have indicated above the facts of this case are that the notice of motion and the supporting affidavit was served on Ms Daphne Swanepoel, Ms Swanepoel opposed the application and an answering affidavit was deposed to on her behalf. Since the second respondent as she is described in the amended notice of motion is clearly recognizable from the original notice of motion I am satisfied that the original citation of the second respondent as a close corporation was a mere misdescription or misnomer which could be corrected by the amendment sought and that the applicant's application for the amendment must succeed.

[31] The respondents also take issue with the non-joinder of Martha Keeve, for the reason that she is married to the first respondent in community of property and she is alleged to be a joint co-owner of the property**.** Mr. Jones argued that by virtue of her alleged joint ownership in the property, Mrs. Keeve has a direct and substantial interest in the issues involved and the order which the court might make and the applicant was given notice that Mrs. Keeve is a necessary party who has not been joined the applicant's failure to join Mrs. Keeve, is fatal and the application, at the very least stands to be struck off the roll.

[32] The circumstances under which it will be necessary to join a party to matter were explained by Corbett J, in the matter *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another*[14] where he said:

'It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and

[14] 1972 (4) SA 409 (C) at 415E – H.

> substantial interest in the issues involved and the order which the Court might make…In *Henri Viljoen (Pty.) Ltd. v. Awerbuch Brothers*, 1953 (2) S.A. 151 (O), Horwitz, A.J.P. (with whom Van Blerk, J concurred) analysed the concept of such a direct and substantial interest and after an exhaustive review of the authorities came to the conclusion that it connoted (see p. 169) —
>
> > "…an interest in the right which is the subject-matter of the litigation and…not merely a financial interest which is only an indirect interest in such litigation."

[33] In this matter, all we are told is that Mrs. Keeve is married in community of property to the first respondent. No evidence has been placed before me to prove that fact nor is there a confirmatory affidavit from Ms Keeve to confirm that allegation. The respondents did furthermore not place any evidence before me to justify the conclusion they have arrived at that Ms Keeve is a co-owner of the property. Another question is whether Ms. Keeve has a direct and substantial interest in the subject-matter of this litigation, that is, the *spoliation*, or whether her interest is merely a financial interest that is only indirect and therefore does not require her joinder. The answer is clear. On the papers before me it is apparent that Mrs. Keeve is not a party to the lease agreement she merely consented to her spouse concluding the lease agreement, she was not involved in the replacement of the locks and the changing of the alarm codes and alarm frequencies at the property. It is not clear whether she was even aware that respondents changed the property's locks. The interest which Ms. Keeve has in this matter exists only by virtue of the fact that she and Mr. Keeve are alleged to be married in community of property (a fact as I said not proven). I accordingly disagree with Mr. Jones that the circumstances set out by Corbett J, in the matter of *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* are present. I am thus of the view that the first point *in limine* must fail.

No cause of action

[34] The second point in *limine* raised by the respondents is the alleged failure by the applicant to disclose a cause of action. Mr. Jones argued that the applicant's application is one where she is attempting to enforce her liens and that she has been unable to show, *prima facie*, that she is in fact entitled to exercise the liens claimed. Mr. Jacobs on the other hand argued that the respondents are wrong in that regard. He submitted that the only relief that the applicant seeks in her application, is return of possession. He further submitted that the applicant does not seek to enforce her lien.
[1.]

[35] My understanding of the notice of motion is that the applicant is seeking an order directing the first and second respondents to, immediately and forthwith, restore *ante omnia* possession of the property described as: [Erf 4…….], [7……] [R…….] Avenue, [K…….], [S……], Namibia, to her. There is no other remedy, except costs which the applicant prays for in her notice of motion. My understanding of the relief sought in the notice of motion is further confirmed by the founding affidavit of Ms. Ludik when she states in paragraph 3 of that affidavit that the purpose of the application is to:

> 1.3. ' obtain return of my peaceful and undisturbed possession of the property described as [Erf 4……], no. [7…….] [R…..] Avenue, [K…….], [S……..], Namibia, of which I have been unlawfully deprived by the respondents.'

1.4.

1.5. [36] It is true that the applicant in her supporting affidavit makes mention of the fact that she is advised that she has a *lien* as security for her claim to all the improvements to the property paid for by her. Where there was prior agreement on the improvements she has a debtor-creditor *lien*, and where there was no prior agreement, she in any event as the lessee, has an enrichment and improvement *lien*. She further states that her *lien(s)* allow her to remain in possession of the property until such time as she is reimbursed. But this in, my view, does not mean that by this application she is seeking to enforce her lien(s). In my view the statements by the applicant relating to her alleged lien(s) are but justification for her not wanting to part with her possession of the property.

1.6.

1.7. [37] It is trite that during spoliation proceedings the applicant only has to prove that he or she was in possession of the thing and that he or she was illicitly ousted (despoiled) from such possession. In this matter the applicant does allege that she moved onto the property shortly after the 15th of July 2014 and remained in possession of the property ever since that date. She further alleges that on the afternoon of 4 November 2015 the second respondent instructed a security company to change the locks and remote frequency to the property thereby depriving her of the uninterrupted, peaceful and undisturbed possession she has had to the property. If these allegations by the applicant are found to be true she will succeed in the relief she is seeking and I am therefore satisfied that she has set out a cause of action for the relief she is seeking and the respondents' second point *in limine* must equally fail.

The legal principles applicable to *mandament van spolie*

[38] Having found that, the relief which the applicant seeks is an order directing the first and second respondents to restore to her the property described as [Erf 4…….], No. 76 [R……] Avenue, [K…….], [S…….], Namibia, I will briefly deal with the legal principles applicable to the relief claimed.

[39] The applicant's application to restore her possessory status quo *ante* is based on the principle: *spoliatus ante omnia restituendus est*. In the matter of *Greyling v Estate Pretorius*[15].' Price J explained the principle as follows:

> 'When people commit acts of spoliation by taking the law into their own hands, they must not be disappointed if they find that Courts of law take a serious view of their conduct. The principle of law is: *Spoliatus ante omnia restituendus est*. If this principle means anything it means that before the Court will allow any enquiry into the ultimate rights of the parties the property which is the subject of the act of spoliation must be restored, to

[15] 1947(3) SA 514 (W) at 516 at 517A.

> the person from whom it was taken, irrespective of the question as to who is in law entitled to be in possession of such property. The reason for this very drastic and firm rule is plain and obvious. The general maintenance of law and order is of infinitely greater importance than mere rights of particular individuals to recover possession of their property.'

[40] Maritz JA[16] said that the principle, which may share some characteristics with the various possessory remedies available under Roman law, is rooted in canon law and was later subsumed and developed in our common law as the *mandament van spolie*. He continued and said that the mandament, it was held, may be granted -

> 'if the claimant has been unlawfully deprived of the possession of a thing. It does not avail the spoliator to assert that he is entitled to be in possession by virtue of, e.g., ownership, and that the claimant has no title thereto. This is so because the philosophy underlying the law of spoliation is that no man should be allowed to take the law into his own hands, and that conduct conducive to a breach of the peace should be discouraged'.

[41] Viviers J[17] said that the remedy of *mandament van spolie* is aimed at every unlawful and involuntary loss of possession by any possessor, and its object is no more than the restoration of the status *quo ante* as a preliminary to any inquiry or investigation into the merits of the respective claims of the parties to the thing in question. In this regard, Greenberg JA noted in the matter of *Nienaber v Stuckey* [18] that**:**

> '(a)lthough a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the status *quo* be restored, it is to that extent a final order'.

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16 In the matter of *Kuiiri and Another v Kandjoze and Others* 2009 (2) NR 447 (SC) at 461.

17 In the matter of *Ness and Another v Greef* 1985 (4) SA 641 (C) at 647B-C.

18 1946 AD 1049 at 1053.

[42] One of the essential constituent elements of the mandament which a *spoliatus* is required to so establish on the evidence is that he or she had been 'in possession' of the thing when spoliation occurred. In the matter of *Kuiiri and Another v Kandjoze and Others*[19] Parker J said that possession is an amalgam of a physical situation (i.e. the physical detention of a corporeal thing by a person) and a mental state (i.e. the intention of holding the thing as that person's own). In *Ness and Another v Greef*[20] Viviers J stated that the words 'peaceful and undisturbed possession' probably mean sufficiently stable or durable possession for the law to take cognisance of it.

[43] From the authorities it is clear that an applicant for a spoliation order bears the burden to prove the facts (namely that he or she was in peaceful and undisturbed possession of the thing in question at the time he or she was deprived of possession) necessary for the success of the application on a balance of probabilities. In sum, in the present application the applicant must, on a balance of probabilities, prove that, at the time she claims that she was unlawfully ousted, she was in possession of a kind which warrants the protection accorded by the remedy. Keeping the foregoing principles and requirements in mind, I proceed to apply them to the facts of this case, as I have found them to exist.

<u>The application of the legal principles to the facts</u>.

[2.] [44] It is indisputable that the applicant took occupation of the property after 15 July 2014 and remained in occupation of that property until at least 31 October 2015. The respondents further admit that after 31 October 2015 the applicant did not hand over the keys and the remote controls to the property over to them. The respondents do admit that by 4 November 2015 they could not gain access to the property because the

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19 2007 (2) NR 749 (HC).

20 *Supra* footnote 17 at 647D.

keys to the doors of the property and the remote controls to the garage doors of the property were still in the possession of the applicant. The respondents do not deny the fact that on 4 November 2015 they instructed a security company to change the locks at the property and to change the alarm and remote control frequencies at the property so that that they could gain access to the property. They also do not deny that by changing locks and the remote control frequencies to the property they in effect denied the applicant access to the property.

[3.]

[4.] [45] The respondents' contention is that as on 31 October 2015 the applicant was no longer in possession of the property and their acts of changing the locks and the remote control frequencies do therefore not amount to illicitly depriving the applicant of the possession of the property. Mr Jones puts it as follows in his heads of arguments.

[5.]

'At the outset, I submit that on the facts, the applicant was not in possession of the property and neither was she unlawfully deprived of possession.

It is from this premise that I depart and as a result the following salient facts appear from the papers: The applicant remained in possession of the property after 31 July 2015.

On 28 October 2015 the applicant informed respondent that she was no longer interested in remaining in the property and that she was busy moving out and that she would vacate the property before the end of October 2015.

On 28 October 2015 the applicant sends an email to the respondent informing him *inter alia* that she was busy packing and would be out of the property by the next week. She further wanted to know to whom she should return the keys to and who would come and do the inspection of the property.

The lease between the parties terminated on 31 October 2015.

The applicant moved out prior to this and never made or tendered payment of the rent of 1 November 2015.

The applicant also caused to have the municipal services and the electricity services which are supplied by Erongo RED disconnected.

Having moved out of the property, removing all of her possessions and disconnecting the water and electricity services the applicant only needed to attend the inspection of the property and hand over the keys.

It was only on 3 November 2015 and after the applicant became aware (upon the purported advice of her legal practitioners) that she could retain possession of the property in order to enforce a lien.'

[6.]

[7.] [46] I do not agree with Mr Jones. Firstly the electronic mail send by the applicant to first respondent does not state that the applicant will vacate the property on 31 October 2015, what the applicant stated is that *she expects to be out of the property by 'next week'*. If one has regard to the fact that 28 October 2015 was a Wednesday, 'next week' could mean any day between Sunday 1 November 2015 and Saturday 8 November 2015. The allegation that the applicant lost possession on 31 October 2015 is therefore not supported by the evidence.

[8.]

[9.] [47] Secondly Maritz JA[21] approved the emphasis by Coetzee J[22] that -

[10.]

[11.] '(o)n termination of a lease the lessee's right to the use and enjoyment of the property ceases absolutely and he is bound to restore the property to the lessor'.

[12.]

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[21] In the *Kuiiri v Kandjoze* (footnote 11) appeal matter.

[22] In the matter of *De Beer v First Investments Ltd* 1980 (3) SA 1087 (W) at 1092H.

[13.] The question therefore is whether in this matter the applicant restored the property to the respondents. The restoration normally and generally takes place with the handing over of the keys to the building to the owner. The handing over of the keys to a building is not only an important symbolic act of delivery but, it also constitutes an act of 'transferring' possession of and control over the building and its contents to the receiver. In the matter of *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[23]. Thring J considered the authorities regarding the handing over keys and said the following:

[14.]

> [15.] '(1) There is no particular magic in the possession of keys to a building as a manifestation of possession of the building; as a mere symbol their possession alone will not per se necessarily suffice to constitute possession of the building; to have that effect they must render the building subject to the immediate power and control of the possessor of the keys: they must be the means by which the latter 'is enabled to have access to and retain control of the building' ...
>
> [16.]
>
> [17.] (2) To be effective in conferring possession of the building on or retaining it for the possessor of the keys, the keys must have the effect of enabling their possessor to deal with the building as he likes (in the sense of affording him access thereto) to the exclusion of others (*Scholtz v Faifer* (supra) at 247); after all, that is the primary purpose which locks and keys are designed to achieve.
>
> [18.]
>
> [19.] (3) Where, as here, possession of the building is sought to be retained adversely to its owner, possession of the keys must, subject to what follows, have the effect of excluding the owner, in the sense of precluding him from exercising the right of possession which an owner of property usually enjoys (*Liquidators of Royal Hotel Co v Rutherford* (supra) at 181 and *Scholtz v Faifer* (supra) at 246). '

[20.]

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[23] 2007 (2) SA 128 (C) at 134G-135A

[21.] In this matter the applicant, was contractually obliged to restore the leased premises to the first respondent upon termination of the lease. She did not do so. It follows that the fact that the applicant vacated the property does not mean that she lost possession of the property. Maritz JA puts it as follows:

> [22.] 'Possession of an immovable thing may, of course, be lost for a number of reasons. Whether the possessor's physical absence from the immovable thing or the nature and extent of the use, occupation or control thereof by another party justifies the inference that the physical and/or mental requirements necessary to sustain possession are no longer present, must be determined with regard to the circumstances of each case.'

[23.]

[24.] [48] Thirdly for the respondents to allege that the applicant lost control of the property they had to prove that that the applicant lost the physical control or the mental element which is required to constitute possession. The respondents would then have to establish that they acquired possession of the property acquiring both the physical control (i.e. the physical detention of a corporeal thing) and a mental state (i.e. the intention of holding the thing as that person's own) of the property.

[25.]

[26.] [49] In the present matter the respondents simply rely on the electronic mail of 28 October 2015 as an expression of the fact that the applicant allegedly no longer had the intention of remaining in possession of the property after 31 October 2015. The reliance on the electronic mail is, in my view misconceived. I say so for the following reason, in the electronic mail of 28 October 2015 the applicant does not unequivocally state that she intends to hand over possession of the property to the respondent. In the electronic mail the applicant makes it a clear that her vacation of the property and the handing over of the keys are linked to first respondent reimbursing her for the improvements she has effected to the property. I therefore find that the respondent has failed to prove that the applicant lost possession of the property. The respondents did not go to court when they changed the locks and the frequencies of the remote controls to the property they resorted to self-help and this is what the remedy of *mandament van*

spolie aims to prohibit. I therefore find that the applicant has discharged the onus resting upon her and has proven that she was in peaceful and undisturbed possession of the property on 4 November 2015 when the respondents resorted to self-help and changed the locks and alarm frequencies to the property.

[50] In his submission, Mr Jacobs pressed me into ordering costs in favour of the applicant, including costs of an instructing and instructed counsel. Mr Jones conceded that the cost must follow the course and the costs of one instructing and instructed counsel. I therefore, in my discretion costs must follow the course.

[51] In the result I make the following order:

1 The non-compliance with the rules of this court and hearing the application on an urgent basis as is envisaged in rule 73(3) of the High Court Rules is condoned.

2 The application for the amendment of the notice of motion for the substitution of *Daphne Swanepoel Properties CC"* with *"Daphne Swanepoel trading as Daphne Swanepoel Properties"* as the second respondent is granted.

3 The first and second respondents are ordered to forthwith restore the applicant's peaceful and undisturbed possession *ante omnia* in and to the property described as: [Erf 4……], [7……] [R…….] Avenue, [K…….], [S…….], Namibia, to the applicant.

4 The first and second respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay applicant's costs, such costs are to include the costs of one instructing and one instructed counsel.

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Judge

APPEARANCES

APPLICANT:	S J Jacobs Instructed by Delport Nederlof Attorneys
RESPONDENTS:	JPR Jones Instructed by Petherbridge Law Chambers